Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The
Ohio Court Of Appeals For The
Seventh Judicial District

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER DUE PROCESS IS DENIED THE ACCUSED WHEN DESPITE THE LACK OF A SUBSTANTIAL BASIS FOR CREDITING RANK AND UNCORROBORATED HEARSAY THE TRIAL COURT DENIES A MOTION TO SUPPRESS.

II

WHERE THE RECORD SHOWS THE ALLEGED INFORMANT WAS RECRUITED AND PAID BY THE POLICE AND HIS ACTIONS ORCHESTRATED BY THEM, CAN HE THEN BE REGARDED AS AN AGENT OF THE AFFIANT AND AS SUCH THE DEFECTS IN HIS CREDIBILITY IMPUTED TO THE AFFIANT?

III

WHETHER DUE PROCESS WAS DENIED WHEN A TRIAL COURT (FOR AUGHT THAT APPEARS) ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES AND WHEN HE CREDITED A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY EVIDENCE, MOST OF IT REMOTE, IN HIS DETERMINATION THAT THE AFFIDAVIT SET FORTH PROBABLE CAUSE.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Lester Scott, respectfully prays that a Writ of Certiorari issue to review the judgment of the Seventh District Court of Appeals, which judgment became final on July 1, 1998, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Opinion of the Ohio Court of Appeals, against which this Petition is directed, was issued on March 9, 1998. This Opinion is designated **Appendix "A", pp. A1 to A18**, in the Appendix to this Petition. The Entry of the Ohio Supreme Court denying further appellate review was entered on July 1, 1998, the critical date herein. It is designated herein as **Appendix "B", p. A19**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio, as indicated above, was entered on July 1, 1998. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fourth Amendment, United States Constitution;
2. Fifth Amendment, United States Constitution;
3. Sixth Amendment, United States Constitution;
4. R. C. of Ohio, §2923.24 ;
5. R.C. of Ohio, §2925.22 ;
6. Rule 12, Ohio Rules of Criminal Procedure;
7. Rule 41(e), Ohio Rules Of Criminal Procedure.

STATEMENT OF THE CASE

The Fourth Amendment issues in this case were raised in petitioner's *Motion To Suppress* filed pre-trial under favor of **Rule 12, Ohio Rules of Criminal Procedure**. The Motion was denied and the issue was raised again in the appeal to the Ohio Court of Appeals which affirmed the denial of the Motion.

In so doing, the Court of Appeals expressly held:

(1) The affidavit supplied sufficient information for concluding that probable cause existed.

(2) That "appellant was incorrect in this primary assertion that he has shown the informant's statements to be false" and that this was so because, although unimpeached, indeed not even challenged, "it ... [was] obvious the trial judge did not find Ms. Scott's or Ms. McGauley's statements credible" and for that reason "appellant did not meet his [Frank's] burden of proof".

(3) That despite the contention any statements made by the alleged source should be imputed to the affiant because he was solicited and paid, the appellant failed to show that the affiant himself misrepresented the truth in his affidavit.

The relevant facts with reference to the federal questions sought to be reviewed are easily stated. Petitioner was indicted for a drug possession charge that surfaced in the wake of his arrest and the searches herein being challenged. Specifically he was charged with possession of a controlled substance, to-wit: cocaine, in violation of R.C. of Ohio, §2925.03.

In our case, the critical fact that must be reckoned with is the rank hearsay statement, attributed to an alleged informant, that there were drugs on the premises. As to this statement in the Affidavit in which it was said a sale had been made within the past seventy two (72) hours, the evidence is in serious and irreconcilable conflict. One officer says that an alleged informant had simply noted (as though in passing and apparently almost as an afterthought) that there were drugs on the premises, which version conflicts with the other affiant's version - - as shown

below.

Of no mean significance here, there was nothing set forth in the Affidavit that provided any corroboration, none whatsoever, for this alleged tip. So postured, it can easily be understood why a statement in an Affidavit that the informant had helped the police in the *recent* past, or a statement that the police had conducted surveillances that corroborated, by actual observation, some material averment (or averments) attributed to the informant in the Affidavit, can be of considerable significance in a probable cause equation. But in this case, the *recency* element can hardly be said to have been met. Additionally, the information previously supplied was shown to have been quite nebulous. Distilled the information had supposedly confirmed that two named individuals the police were investigating were simply involved with drugs. Further, this informant was not only recruited (**Tr., p. 33**), he was actually paid for services rendered (**id., pp. 35-36**). Also, he was obviously assured he would never have to testify (**id., pp. 18-19**).

Likewise significant here is the fact of the total lack of detail or specificity in the alleged hearsay tip. For example, had the alleged informant provided some particularized distinguishing characteristics of the apartment, its contents and the like, at least that would have been something. In this case, of course, the details supplied in the Affidavit all related to hearsay recitations and what can only be said was the naked opinions of the affiants - - and the informant.

Granted most of the arguments made in this *Petition* were made to the trial Court and apparently rejected by him. Because these arguments are clearly applicable here, they are repeated almost verbatim. Here the Court should understand counsel precisely contended to the trial Court, which contentions were confirmed by the Court of Appeals, that:

> **One**, there is no verifiable way the State can demonstrate the dates of the various contacts the

alleged informant supposedly had with the affiants and was said to have contributed the information attributed to him by the affiants.

Two, with reference to the alleged complaints concerning drug activity on the premises searched and as to the surveillance supposedly made, no record of these alleged events can be produced.

Three, there is nothing set forth in the Affidavit which informed the Magistrate of either, the informant's [extensive] criminal record or of his motivations. If his actions were done in hopes of compromising charges involving himself, clearly this should have been indicated to the Court.

Four, no indication as to the source of the funds supposedly used or if official funds were used, no record demonstrating this to be the case ... [would be] forthcoming. Additionally, there was no reference to the fact that the alleged "informant was paid $20 for his services".

Five, there is no meaningful Record of any interviews conducted with this informant in connection with any aspect of this case.

Other critical facts, to a considerable extent, are aptly summarized in the following excerpts from the Affidavit:

* * *

"3. Beginning in the month of January, 1994, and continuing to the present date, *Officers have received intelligence information from the P.O.S.S.E. Unit comprised of Youngstown Police Officers,* that Lester and Alex Scott engaged in large scale drug sales from 1225 Otis, #254 & 255 and 1183 Otis, #261. Included in said intelligence information, the P.O.S.S.E. Unit reported that the Scotts are using several look outs *** who are

equipped with Realistic two way radio head sets to broadcast to apartments, 254, 255 and 261, the arrival and departure of drug buyers and Police Officers.***"

* * *

"5. *During the week of November 01, 1993*, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 1225 Otis #254 under the controlled conditions to wit: Officers met with and searched the informant with negative results. Officers the (sic.) kept the informant under constant observation to and from the location. Upon returning, the informant turned over to Officers, one baggie containing one rock of crack cocaine."

"6. *During the week of March 14, 1994*, Officers Patton and Russo met with the informant and made a purchase of crack cocaine from 1225 Otis, Apt. #254 under the same controlled conditions described in the previous paragraph. Upon returning, the informant turned over to Officers, one baggie containing crack cocaine."

"7. The cocaine purchased during the week of November 01, 1993, was made from a F/B subject, described as 5'1", 120 lbs., age 23, known to the informant as, Crystal Scott. The cocaine purchased during the week of March 14, 1994, was made from a F/B subject, described as, 5'5", 160 lbs., age 50, known to the informant only as Bert."

Appendix "A", Opinion, pp. A5 - A6. (Emphasis supplied.)

Again, we have the Court ruling that "a reliable informant and a member of the P.O.S.S.E. Unit had both advised officers drugs were being sold from the premises" (**id., p. A11**) and that

"the officers . . . had conducted random surveillance and had observed activity that is consistent with drug sales" (**id., p. A11-12**). This showing, along with the officers' statement that an alleged reliable person told them he had twice purchased drugs from that location and had seen "cocaine on the premises" (**ibid**), was said by the Court to make for "a substantial basis for concluding probable cause existed" (**ibid**). The above ruling was made in spite of the Court having also concluded:

> "the affiants did not document their [alleged] surveillance[s], failed to get a written statement from their [alleged, arguably phantom] informant and could not specifically state who from the P.O.S.S.E. Unit relayed the information that drug sales were being conducted on the premises."

Id., p. A12. Unexplainably, this cogent finding the Court used as a premise for its further finding that "appellant neither proved that any statement in the affidavit was "false, nor that the affiants made a false statement intentionally or with reckless disregard for the truth." (**Ibid**.) Also, it should be noted the Court's specific reference to the "affiants" not having been shown to have made a false statement (**ibid**), fully demonstrates the Court simply failed to reckon with one of our most central contentions. This is so although this argument had been specifically noted by the Court in its recognition of the basis for our reliance on **United States v. McAllister, 118 F.3d 1412 (7th Cir., 1994)**.

Additionally, it seems clear enough that the Court rightly recognized, as we do, that credibility resolutions are for the trier-of-fact. And, we concede that "deference must be given the findings of the trial Court" who is entitled to believe or disbelieve any witness" (**Appendix "A", Opinion, p. A13**). But these tenets do not mean the finder-of-facts can, with impunity, jump from a failure to believe a particular witness' testimony to the conclusion that the reverse of what the witness testified to must be true. Yet, this is precisely what was imputed to the trial Judge

in the Opinion.

Indeed, in this case we had the alleged (non-testifying) police agent being credited with having said he purchased drugs from two named individuals on isolated occasions. Yet, the two individuals credited with making the sales testified this never happened. So postured, given that the trial Court refused to require (despite the defense request) the disclosure of the alleged source, the issue came down to whether the hearsay declarations of a non-testifying declarant alone were sufficient to not only impeach all contrary evidence, but to establish its own validity. With this being so, nakedly telling us, as the Court does, that the "trial Court had [hearsay] evidence before it, through the affidavit of Officers Patton and Russo [which showed they had been told] that Ms. Scott and Ms. McGauley had sold drugs to the informant from the premises" **(id., p. A13)**, hardly seems to be an appropriate response.

Also significant here, given the Court's critical ruling that the Magistrate had a substantial basis for crediting the information supposedly supplied by the source as to the two alleged sales and to his supposedly having stated he had seen narcotics when he made his second purchase, said to have been within the past 72 hours **(id., p. A6)**, is the testimony as to the alleged surveillances:

> Q. So that what you're telling the Court is that of the 40 some odd times that you drove past this house, you saw one car that arrived that had a person in it that you came to know?
>
> A. That I came to know, yes.
>
> * * *
>
> Q. ... So what that is saying is that you saw some person[s] going and coming; you don't know what their purpose was, and you don't know who they were?

A. That's correct.

Q. You didn't put that in your affidavit, did you?

A. No, I did not.

Q. What you put in your affidavit was language that tended to suggest that these people were entering those premises for the purpose of purchasing drugs, right or wrong?

A. That's correct.

Tr., pp. 12-14.

With reference to the so-called "intelligence" supposedly given the affiant-officers by the so-called "P.O.S.S.E. Unit," when asked if they had simply passed on rumors, the officer's pathetic response was: "... I don't know. I have to take what they pass to ... they give me [sources] information." **Id., p. 15**. As to the cocaine said in the Affidavit to have been seen by this alleged source on the premises during the past 72 hours, in addition to saying he did not ask how much had been seen, the affiant testified:

Q. ... On the 18th [the day the Affidavit was written] you allege that within the past 72 hours he made a purchase?

A. That's correct.
In the Affidavit I said that, yes.

Q. Now are you saying that the allegation that he had seen cocaine on the premises in the past 72 hours is a reference to the cocaine he purchased during the week of March 14?

* * *

A. Yeah. You're saying it happened at the same time?

Q. Right.

A. I'm saying, yes it did. However, he ... the informant advised myself there was more cocaine present in the house other than what was purchased.

* * *

Q. Find the portion in there where you advised the Court that ... the informant had seen cocaine on the premises other than that which he purchased? Take your time.

A. It's item – No. 12 simply states the informant has been to No. 254 in the past 72 hours an[d] observed cocaine on the premises. It doesn't make a distinction.

* * *

Q. Right. Now ... how can the Magistrate, reading this in a realistic fashion, come to the conclusion that the informant made a purchase during the week of 3/14 and also saw additional cocaine on the premises? How can you get that out of those allegations?

A. I don't know how the Magistrate would get it, I wrote it how I felt it was.

Id., pp. 23-27.

Next, the other affiant, Officer Russo, testifying to this same event, gave equally incredulous testimony:

Q. In other words, he observed the rock of cocaine [that he supposedly had purchased]?

A. That's correct. That was the buy.

* * *

Q. Now in the Report that you wrote up involving that transaction, did you put in there that the ... informant had seen [other]

cocaine on the premises?

A. No.

* * *

Q. You knew you had to convince the Judge that was issuing the warrant that there was reason to believe there was some cocaine on the premises when the search warrant was to be executed....

A. Yes, sir.

Id., pp. 53-63. The above testimony is augmented by questions asked by the Court:

THE COURT:	Were you able to verify the fact that cocaine was purchased from Crystal Scott on one occasion and from Bert on another? Was there any way for you to verify that, or did you have to rely on the informant to give you that information?
THE WITNESS:	We had to rely on the informant.
THE COURT:	There was no observations of those person[s] on those dates, is that correct, by you?
THE WITNESS:	Physically, no.
THE COURT:	By you or other officers?
THE WITNESS:	No sir.
THE COURT:	Had you ever observed them [i.e., Crystal and Bert] on the premises before?
THE WITNESS:	Me personally, no.

Id., pp. 70-71.

Here again it should be noted the Court of Appeals simply refused (rather brazenly, as we see it) to reckon with the fact that the affiants withheld from the affidavit critical facts relative to any meaningful assessment or evaluation of their alleged source. The non-disclosed information in this case was that the alleged source had a felony record (two convictions) and a "misdemeanor record" (**Tr., p. 33**). Also, the alleged "reliable" tag placed on the source related to very stale events that involved only peripheral information concerning two other individuals. Also, the fact that this informant was solicited and paid was likewise conspicuously absent from the affidavit. These details magnify the hollowness of the Opinion's repeated indications that the Judge totally disbelieved the specific denials made by those who were credited by the alleged source with having made the two drug sales in this case.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This appeal, in a drug possession case, brings to the Court issues that have not been appropriately addressed by any of the Ohio Courts below. Simply put, aspects of the Court of Appeals' Opinion reflect the rather patented penchant most Ohio Judges have long had for gospelizing almost anything and everything a police officer says in these swearing contests with mere citizens. Here, however, in this case it is most obvious the findings actually made clearly show that the police acted improperly. It is for this reason the critical rulings of the trial Judge and the Appellate Court cannot survive meaningful scrutiny. Since the Fourth Amendment issues resolved in this Opinion will affect others in our State, the failure of the Ohio Supreme Court to step in and resolve this issue is not only unexplainable and indefensible; it is also unacceptable as well.

At the heart of the contentions made below, as we see it, is the well known, indeed undeniable, fact "that lies about the

existence of an undisclosed informant and his reliability are easy to tell yet most difficult to uncover". **Commonwealth v. Lewin, 405 Mass. 275, 542 N.E. 2d 275, 276 (1989)**. Also see **State v. Hunt, 22 Ohio App. 43 (Cuyahoga County, 1984)** and **State v. Dodson, 43 Ohio App. 2d 31 (Cuyahoga County, 1974)**. The point here being that it is undeniable that the police in Ohio are as good and as bad as police elsewhere. Yet in the years since **Franks**[1] and **Gates**[2], both *supra*, our courts have found it almost impossible to view a search warrant affidavit as being insufficient or to find that a **Franks** violation occurred. The reason, of course, could not be more obvious - - especially if it is a drug case - - even one where a paltry sum of drugs, if any, were actually found - - the case here.

Since it is truly unrealistic to believe that all Affidavits submitted to Ohio Judges are invariably sufficient and that the contrast between the true facts and their sworn averments are all insignificant, it follows that while there was, and still is, a need for our Supreme Court to provide us with a recent precedent that demonstrates the Fourth Amendment is still alive and well in Ohio and is worth preserving. The existence of this need is what makes this case one that truly cries out for satisfaction. This follows because the Affidavit in this case, upon inspection by anyone who is reasonably-well informed, simply cannot pass muster.

Granted counsel is convinced that at least in Ohio, the "war on drugs" has virtually eliminated in its wake the Fourth Amendment. But surely that does not mean that all a police officer has to do is ask for a warrant and it will be given. Yet this is what happened here. Because the Affidavit in this case is so clearly deficient and because the Courts below seem so clearly

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[1] **Franks v. Delaware, 438 U.S. 154 (1978).**

[2] **Illinois v. Gates, 462 U.S. 213 (1983).**

indifferent to the cogent arguments made by the petitioner, the arguments made below, if invalid, should be dealt with by this Court and be expressly repudiated - - as arguably they should have been by the Courts below.

ARGUMENT NO. I

DUE PROCESS IS DENIED THE ACCUSED WHEN DESPITE THE LACK OF A SUBSTANTIAL BASIS FOR CREDITING RANK AND UNCORROBORATED HEARSAY, THE TRIAL COURT DENIES A MOTION TO SUPPRESS.

Granted the Affidavit in this case sets forth that isolated drug sales of (a) "one baggie containing one rock of cocaine" during the week of *November 1, 1993*, and (b) "one baggie containing crack cocaine" during the week of *March 14, 1994* had occurred on the premises. Aside from the fact of more than one hundred days between the indicated sale dates, the alleged sellers in these transactions both *denied* these sales occurred. Further, it was alleged and shown that no one could have ever mistaken Crystal Scott (and certainly no one who claimed to know her as one of the informers would have described her) as being 5'1", 120 lbs., and age 23 as was alleged in the Affidavit. Additionally. it was specifically alleged that, as is often the case with police officers, the officers created these alleged informants out of whole cloth. This police officers are known to do. Cf., **State v. Hunt, 22 Ohio App. 3d 43 (Cuyahoga Cty., 1984)** and **Massachusetts v. Lewin, 405 Mass. 275, 542 N.E. 2d 275 (1989)**.

Our points here are well made once it is understood that the alleged sources in this case, including the alleged P.O.S.S.E., did not provide a single verifiable detail. This brings us to the heart of our criticism of the assailed conclusions by the Courts below that seems clearly to say that a Judge's decision to issue a warrant is virtually, if not actually, impervious to assailment as being deemed flawed. Judging from the paucity of cases in this

State (the home of **Mapp v. Ohio, 367 U.S. 643 [1961], Beck v. Ohio, 379 U.S. 89 [1964] and Smith v. Ohio, 494 U.S. 541 [1990]**), that have actually found a Search Warrant Affidavit to be insufficient, the trial Court's position in this regard is really understandable. This is so because Ohio has long been viewed as a prosecutor's paradise, especially where the officers have a warrant. See **State v. Hunt, 22 Ohio App. 2d 43 (1984), State v. Dodson, 43 Ohio App. 2d 31 (1974)** and **State v. Young, 185 N.E. 2d 33(1963)**.

Be all that as it may, there are several considerations here that should not be overlooked, either by counsel-opposite or the Court. To begin with, the affidavit in this case contains references, not only to the alleged source who made the isolated purchases while supposedly inside the premises, but to other alleged sources. These include rank hearsay information supposedly supplied by a police organization dubbed the P.O.S.S.E. and others. The central point recognizes that information from sources (particularly when it is essential to a finding of probable cause - - the case here) must meet certain constitutional standards of reliability before it can ever be considered in any probable cause equation.

On this point, it should be noted that this Court in **Franks, supra**, actually addressed one of the problems here. It did so when it declared the "police [can] not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity" (**438 U.S., at 164, n. 6**). With this being so, even if these affiants filed their Affidavit in good faith *and* the Affidavit correctly reflected what they had ben told by the source, the defense contentions as they were structured required findings by the trial Court, is that these considerations were insufficient to carry the day.

ARGUMENT NO. II

WHERE THE RECORD SHOWS THE ALLEGED INFORMANT WAS RECRUITED BY THE POLICE AND HIS ACTIONS ORCHESTRATED BY THEM, FOR ALL INTENTS AND PURPOSES HE MUST BE REGARDED AS AN AGENT OF THE AFFIANT AND AS SUCH HIS (THE SOURCE'S) CREDIBILITY MUST BE APPROPRIATELY ASSESSED.

In this case, it is most significant that this is not a case where a police officer-affiant relied on information supplied to him in bad faith by a citizen-informant. Rather, this is a case where an alleged informant (if he actually exists) arguably could not be regarded as a mere citizen-informant. The effect of such a finding would require, if the statements about the informant were false, that they be imputed to the affiant himself. See **United States v. McAllister,**[3] **18 F. 3d 1412 (7th Cir. 1994)**. The particular point here being made is truly magnified by the following cogent testimony that was provided by Officer Patton (one of the affiants):

Q. When he made that purchase, did you debrief him after that transaction?

A. Yes.

Q. And did he write out a statement?

* * *

A. No, the informant didn't write out a

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3 **McAllister** makes the cogent point that where the alleged informant is acting . . . as an agent of the officers, his false statements can be imputed to the officers (**id., p. 1417**). Clearly then the holding here that **Franks** requires a showing that "the affiant made ... [the] false statements" (**Appendix "A", Opinion, p. A 12**) is at odds with this thesis.

statement.

Q. Why not?

A. Because I didn't feel it was necessary. *The informant is not a cooperating witness in this case.*

* * *

Q. What do you mean by he's not cooperating? Did you send him into some premises to make a purchase - - he's not cooperating with you?

A. *He's not cooperating in the sense that he's going to give verbal testimony in the courtroom against the individual he made the purchase of narcotics from.*

Tr., pp. 18-19. (Emphasis supplied.)

Another critical point in this mix stems from the fact that the alleged informant (who reportedly says he purchased drugs on the premises searched and who *reportedly* told the affiants there were additional drugs on the premises) was not only paid (**Tr., pp. 28 & 34**), his actions were directed by the officers who (if they are to be believed) actually orchestrated his conduct. So postured it could not be any clearer that this alleged person was indeed acting as a police-agent at all of the relevant times in this case. See **United States v. Koenig, 856 F.2d 843, 847 (7th Cir. 1988)**. Also see **United States v. Pritchard, 745 F.2d 1112 (1984)**.

Even this is not all. It was also established here that clearly this informant's conduct can be contrasted with that of those informants who assist the police to further their "own interest in hope of increasing [their] chances of receiving favorable treatment in the handling of [their] own pending drug charges" (**McAllister, 18 F.3d at p. 1418**). Rather, if an informant existed, clearly his purpose was to assist the police, a service he performed for pay. With this being so, the fact that it

was shown the informant lied requires that the lies told by him must be imputed to the affiants.

Clearly then this case pinpoints critical flaws in the trial Court's "findings." Indeed, by myopically focusing on what it perceived to be the dispositive issue under **Franks v. Delaware, 438 U.S. 154 (1978)**, the Court of Appeals obviously regarded this all important issue to be: whether the affiants themselves lied in their Affidavit. In doing so, the Court ignored the fact that *if* the alleged informant *lied*, then his lies could be imputed to the affiants. Also, the Court failed to reckon with the fact that the critical, indeed the indispensable, basis for the search warrant itself, was the statement allegedly made by the informant that he had seen drugs on the premises.

So postured, any reliance by the affiants, or the Court that issued the warrant, on this alleged statement cannot be defended. This follows since it truly cannot be said with any degree of impunity that the alleged informant actually told them he had seen any drugs other than the two rocks supposedly purchased on the premises. To rule otherwise, the Court has to distill the conclusion that he did so from the nebulous testimony of the affiants set forth above (**ante, pp. 4 to 5**).

ARGUMENT NO. III

DUE PROCESS WAS DENIED WHEN A TRIAL COURT (FOR AUGHT THAT APPEARS) ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES AND WHEN HE CREDITED A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY EVIDENCE, MOST OF IT REMOTE, IN HIS DETERMINATION THAT THE AFFIDAVIT SET FORTH PROBABLE CAUSE.

In this case the evidence showed those identified as the

alleged sellers did not participate in the two (2) specific drug sales recited in the affidavit. This testimony was uncontradicted. So postured, we are left without any basis as to why the trial Court rejected their testimony.

In assailing this glaring fault in the Court's rejection of the Motion to Suppress, we recognize the law to be that the Court was required to give meaningful consideration to all the evidence. In doing so, the Court was likewise required to pass on the credibility of all the witnesses and he was suppose to draw reasonable inferences from all the evidence. So postured, it follows that in assessing the credibility (of the witnesses) and in weighing the evidence, the Court clearly was bound by those rules which relate to the acceptance of unrebutted evidence. Here, logic dictates that where the testimony provided by a witness is not contradicted by sworn testimony (the case here) or by the circumstances involved, and the testimony provided was not impeached (also the case here) *and* such testimony was not inherently improbable, then clearly that testimony cannot be rejected with impunity.

What must be understood here is that even if the Court felt the testimony of the defense witnesses (who denied that these sales ever occurred) was, in his judgment, suspect, it is still a fact that there was no evidence from which the Court could have concluded these witnesses were not credible. It follows then that the Court's ruling being contrary to the weight of the evidence could not be accepted or validated by the reviewing court, as it was, as being dispositive. Next, even if we suppose that the Court actually determined that the testimony they provided was wholly devoid of credibility, this Court could only consider itself bound by that determination if there was a factual basis for this position in the Record. Stated another way, if it is the law that judgment made by a trial Judge will not be reversed on appeal by a reviewing court as being against the manifest weight of the evidence when that judgment is supported by some competent evidence, **Seasons Coal Co. v. Cleveland, 10 Ohio St. 3d 77**

(1984), then clearly this logic applies when the reverse is true.

What distills from the above showing is the fact that where unimpeached testimony in support of a proposition is not contradicted and such evidence is not inherently improbable, that testimony cannot be arbitrarily disregarded by the Court. Granted, the law in Ohio on this issue is certainly not as clear as it is elsewhere. Still it only makes sense that even in Ohio, the circumstances under which a trier-of-fact may disregard uncontradicted and unimpeached testimony are severely limited. Logic and common sense dictate that for a Court to reject (as was apparently done here) the testimony of the two defense witnesses, the position here being taken is that the Court could only do so on the basis of some contrary evidence.

CONCLUSION

For the foregoing reasons, the *Petition For Writ Of Certiorari* should be granted and the case set for Briefing and argument this term.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
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ATTORNEY FOR PETITIONER

APPENDIX

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	CASE NO. 95 C.A. 140
	)	
LESTER SCOTT,	)	OPINION
	)	
Defendant-Appellant.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court Case No. 94 CR00351
JUDGMENT:	Conviction affirmed, cause remanded for further proceedings
APPEARANCES:	
For Plaintiff-Appellee:	Paul J. Gains Prosecuting Attorney Janice T. O'Halloran Assistant Prosecutor Mahoning County Courthouse

120 Market Street
Youngstown, Ohio
44503

For Defendant-Appellant:

Atty. James R. Willis
Suite [595]
Courthouse Square Building
310 Lakeside Avenue, N.W.
Cleveland, Ohio
44113

JUDGES:

Hon. Gene Donofrio
Hon. Edward A. Cox
Hon. Cheryl L. Waite

Dated: March 9,1998

DONOFRIO, P.J.

Defendant-appellant, Lester Scott, appeals a jury decision from the Mahoning County Court of Common Pleas in which appellant was found guilty of possession of criminal tools and drug abuse, violations of R.C. 2923.24 and 2925.11, respectively. Appellant was initially sentenced to serve one year on each of the two counts, and ordered to pay a $1,500 fine plus costs. Following a motion for reconsideration, however, the trial court judge suspended appellant's one year sentence and placed appellant on probation for three years. Appellant was also ordered to perform one day a week of community service for one year.

On March 20, 1994, three different apartments on Otis Street, Youngstown, Ohio, were searched by the Youngstown Police Department pursuant to a search warrant issued by Municipal Judge Louis K. Levy. The search warrant was issued based on the affidavit supplied to the court by Youngstown police officers Robert Patton and Terence Russo. The search uncovered, among other things, approximately 6.6 grams of cocaine, two Realistic hand held scanners, twelve Realistic headset radios, and one Uniden Bearcat scanner. The radio equipment was allegedly used for the purpose of criminally relaying messages between apartments in the vicinity regarding the arrival and departure of drug buyers and the police.

Appellant was subsequently charged with possession of criminal tools and drug abuse. On May 10, 1994, appellant entered a plea of not guilty. On June 7, 1994, appellant filed a "MOTION TO DISCLOSE [THE] IDENTITY OF [THE] INFORMANT" and a brief in support, which was subsequently denied. On March 14, 1995, appellant filed a motion to suppress the fruits of the March 20, 1994 search alleging said property was the product of an illegal search. In his March 14, 1995 motion, appellant also requested the return of all "illegally seized" property. Pursuant to Franks v. Delaware (1978), 438 U.S. 154,

98 S. Ct. 2674, 57 L.Ed. 2d 667, a hearing was held on April 3, 1995, on appellant's motion to suppress. See infra. On April 6, 1995, the trial court issued a judgment entry overruling appellant's March 14, 1995 motion to suppress. Following a trial to a jury, appellant was found guilty of possession of criminal tools and drug abuse.

On June 21, 1995, appellant timely filed his notice of appeal.

In his first assignment of error, appellant avers that:

> "THE COURT ERRED WHEN IT RULED THAT A SUBSTANTIAL BASIS EXISTED FOR THE ISSUANCE OF THE SEARCH WARRANT IN THIS CASE."

The basis for the issuance of the search warrant of the premises in question was an affidavit supplied by Youngstown patrolmen Robert Patton and Terence Russo. In the affidavit, the patrolmen attested to the following:

> "1. During the Month of October, 1993, Officers Robert Patton and Terence Russo of the Youngstown Police Department Special Investigation Unit, began to receive complaints from concerned citizens who lived in the area, complaining of illegal drug sales from apartments 254 and 255 Otis, Building 1225, involving the Scott brothers, Lester and Alex.
>
> "2. Also, during the Month of October, 1993, Officers Patton and Russo were approached by a reliable informant who advised Officers that numerous members of the Scott family *** were involved in selling crack cocaine from three different apartments on Otis St., namely apartments 254, 255 and 261. The informant further advised Officers that the informant could purchase cocaine from all three of the said residences.

"3. Beginning in the Month of January, 1994, and continuing to the present date, Officers have received intelligence information from the P.O.S.S.E. Unit comprised of Youngstown Police Officers, that Lester and Alex Scott engaged in large scale drug sales from 1225 Otis, #254 & 255 and 1183 Otis, #261. Included in said intelligence information, the P.O.S.S.E. Unit reported that the Scott's are using several look outs *** who are equipped with Realistic two way radio head sets to broadcast to apartments, 254, 255 and 261, the arrival and departure of drug buyers and Police Officers.***

"4. Based on the above, Officers initiated an investigation and conducted random surveillance at 254 Otis. During the surveillance, Officers observed subjects enter the residence, stay a short period of time and leave. Such activity being common in the illegal sales of narcotics.

"5. During the week of November 01, 1993, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 1225 Otis #254 under the controlled conditions to wit: Officers met with and searched the informant with negative results. Officers the (sic.) kept the informant under constant observation to and from the location. Upon returning, the informant turned over to Officers, one baggie containing one rock of crack cocaine.

"6. During the week of November 01, 1993, Officers Patton and Russo met with a reliable informant and made a purchase of crack cocaine from 12[2]5 Otis, Apt. #254 under the same controlled conditions described in the previous paragraph. Upon returning, the informant turned

over to Officers, one baggie containing crack cocaine.

"7. The cocaine purchased during the week of November 01, 1993, was made from a F/B subject, described as, 5'1", 120 lbs., age 23, known to the informant as, Crystal Scott. The cocaine purchased during the week of March 14, 1994, was made from a F/B subject, described as, 5'5", 160 lbs., age 50, known to the informant only as, Bert.

"8. The exact dates of the cocaine purchases cannot be lsited (sic.) as they may reveal the identity of the informant.

"9. All the cocaine was field tested with positive results and has been sent to Tri-State Labs to be further analyzed.

"10. The informant has been proven reliable in the past by supplying Officers with information leading to the arrest and conviction of Ronnie Law, Docket 92-949 and Ruby Penson, Docket 92-944, for drug offenses.

"***

"12. The informant has been to 1225 Otis #254 in the past 72 hours and observed cocaine on the premises.

"Based on the above, Affiants have reasonable cause to believe that the above premises is being used to store and/or for the trafficking of narcotics of abuse. All in violation of Chapters 2925 and 3719 of the Ohio Revised Code."

Appellant challenged the veracity of the facts set forth in the warrant affidavit and was afforded a hearing pursuant to Franks, supra. See infra. During the April 3, 1995, Franks hearing, the following was elicited: 1) Officers Patton and Russo both testified, concerning the surveillance of appellant's premises,

that they had randomly driven past the premises on at least forty occasions, that they saw persons coming and going, and that it was their belief that such activity was consistent with drug trafficking. (Tr. 11-14, 51-55). Officer Patton went on to testify that no effort was made to record the license plate number of any of the cars, that no pictures were taken of any people coming and going, and that the officers did not record times or dates of said events. 2) Officer Patton testified that intelligence was given to him by a group called the P.O.S.S.E., but was unable to verify a source of the information. (Tr. 15). 3) Officer Patton stated that he debriefed the informant after the controlled buy, but did not get a written statement from the informant. (Tr. 19). 4) Officer Patton testified that the informant was on the premises sometime within seventy-two hours prior to the search and had "seen some drugs there." Officer Patton went on to testify that the informant didn't say, and Officer Patton didn't ask, what quantity of drugs the informant had seen, but did state that it was crack cocaine. Officer Patton also conceded that the affidavit did not make the distinction that the informant purchased the drugs within seventy-two hours prior to the search. (Tr. 25). 5) Officer Patton testified that the affidavit did not include the fact that the informant was paid $20 for his services. (Tr. 28). Officer Patton testified that the informant was convicted of at least two felonies and one misdemeanor, which were not included in the affidavit. (Tr. 33-34). 6) Officer Patton testified that during the course of his relationship with the informant that he had no reason to doubt the informant's veracity or to suspect misrepresentations. (Tr. 43-44). 8) (sic) Officer Russo testified that, to his knowledge, the affidavit did not contain any false statements, and that there was no attempt to mislead or misrepresent anything to Judge Levy. (Tr. 67, 69). 9) Crystal Scott testified that she never sold drugs to anybody out of Apartment 254. (Tr. 96). 10) Alberta McGauley testified that she never sold drugs to anybody out of Apartment 254, or from anywhere else. (Tr. 99).

Appellant argues that the trial court erred in finding that

the magistrate had a substantial basis for concluding that probable cause existed to uphold the warrant. Appellant states that "*** the total absence here of any corroboration for the information supposedly supplied by the various alleged sources is, and was, critical." Specifically, appellant points to the "hearsay information supposedly supplied by the organization dubbed the P.O.S.S.E. and others."

Appellant also argues that the information concerning the purchase of drugs by the informant was shown to be false, that such false statements must be stricken from the affidavit, and that without said statements, a substantial basis did not exist for the search warrant. Appellant rests his conclusions on Ms. Scott and Ms. McGauley's statements that the sales did not occur. Appellant also argues that the "alleged informant" was acting as an agent of the police, that the informant's statements were shown to be false by appellant, and that said "falsity" must be imputed to the affiants. Appellant cites United States v. McAllister (7 Cir. 1994), 18 F.3d 1412, in support.

In State v. George (1989), 45 Ohio St. 3d 325, syllabus, the Ohio Supreme Court stated:

> "1. In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' ***
>
> "2. In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate,

neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant."

In State v. Roberts (1980), 62 Ohio St. 2d 170, at 177-178, the Ohio Supreme Court found that:

"In Franks v. Delaware (1978), 438 U.S. 154, the United States Supreme Court squarely addressed the issue of when a defendant, under the Fourth Amendment, is entitled to a hearing to challenge the veracity of the facts set forth in a warrant affidavit after the warrant has been issued and executed. The court, at pages 155-156, summarized its holding as follows:

"'*** [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, requires that a

hearing be held at the defendant's request. ***'

"A defendant who seeks to overcome the presumption of validity accorded a warrant affidavit by making a substantial preliminary showing of a knowing, intentional, or reckless falsity, has, under Franks, supra, the task of supporting his allegations by more than conclusional accusations, or the mere desire to cross-examine. Instead, a challenge to the factual veracity of a warrant affidavit must be supported by an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim. This offer of proof should include the submission of affidavits or otherwise reliable statements or their absence should be satisfactorily explained. Even if the above is established, the court in Franks stated that an evidentiary hearing to review the validity of the search warrant is not mandated by the Fourth Amendment if, after the affidavit material (sic.) alleged to be false is excluded from the affidavit, there remains sufficient content in the affidavit to support a finding of probable cause."

In State v. Waddy (1992), 63 Ohio St. 3d 424, at 441, the court stated:

"*** To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.' *** 'Reckless disregard' means that the affiant had serious doubts of an allegation's truth."

Crim.R. 41, which controls the issuance of search warrants, states in pertinent part:

> "(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished."

The first step of our analysis is to determine whether or not the magistrate had a substantial basis for concluding that probable cause existed. Based on a review of the affidavit, we conclude that he had. The affidavit supplied sufficient information that drug activity was being conducted on the premises in question. The affiants, Officers Patton and Russo, attested that a reliable informant and a member from the P.O.S.S.E. Unit had both advised the officers that drugs were being sold from the premises. The officers also attested that they had conducted random surveillance and had observed activity that

is consistent with drug sales. The officers stated that a reliable informant had twice, under controlled conditions, purchased crack cocaine from the location, and that the informant had observed cocaine on the premises within seventy-two hours prior to the issuance of the warrant. Thus, the magistrate did have a substantial basis for concluding that probable cause existed.

Next, we must determine whether appellant has overcome the presumption of validity accorded to a facially sufficient search warrant by showing that the affiants made false statements, either intentionally, or with reckless disregard for the truth. Franks, supra, at 155-156, 2676, 762 (sic).

During the Franks hearing, appellant elicited that the affiants did not document their surveillance, failed to get a written statement from their informant, and could not specifically state who from the P.O.S.S.E. Unit relayed the information that drug sales were being conducted on the premises. However, appellant neither proved that any statement in the affidavit was false, nor that the affiants made a false statement intentionally or with reckless disregard for the truth.

Appellant focuses on the fact that appellant had provided sworn statements from Ms. Scott and Ms. McGauley stating that they did not sell drugs from the premises. Appellant believes that this shows the falsity of the informant's statements and that said falsity should be imputed to the affiants. Appellant, however, is incorrect in his primary assertion that he has shown the informant's statements to be false.

> "'[T]he weight of the evidence and credibility of witnesses are primarily for the trier of the facts. *** This principle is applicable to suppression hearings as well as trials.'" State v. Dunlap (1995), 73 Ohio St. 3d 308, 314, quoting State v. Fanning (1982), 1 Ohio St. 3d 19, 20.

In determining manifest weight of the evidence questions, appellate courts must remember that "*** the weight to be given to evidence and the credibility of witnesses are primarily for the

trier of facts." State v. DeHass (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. Deference must be given the findings of the trial court because the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use those observations in weighing the credibility of the proffered testimony. Furthermore, the trier of fact is entitled to believe or disbelieve any witness. State v. Antill (1964), 176 Ohio St. 61. See also State v. Baker (1993), 92 Ohio App. 3d 516, 538.

It is obvious that the trial court did not find credible Ms. Scott's or Ms. McGauley's statements. This was well within the trial court's discretion. The trial court had evidence before it, through the affidavit of Officers Patton and Russo, that Ms. Scott and Ms. McGauley had sold drugs to the informant from the premises. Furthermore, based on the totality of the circumstances, the trial court could find Ms. Scott's and Ms. McGauley's statements to be fabricated and self-serving.

Appellant had the burden of proof at the Franks' hearing. See Franks, supra. Ms. Scott's and Ms. McGauley's statements were not found to be credible. Consequently, appellant did not meet his burden of proof.

Appellant's first assignment of error is found to be without merit.

In his second assignment of error, appellant contends:

> "THE COURT ERRED WHEN, IN ARTICULATING THE ESSENTIAL FINDINGS REQUIRED BY RULE 12(E), OHIO RULES OF CRIMINAL PROCEDURE (FOR AUGHT THAT APPEARS), HE ARBITRARILY OR CAPRICIOUSLY REJECTED TESTIMONY PROVIDED BY TWO UNIMPEACHED WITNESSES, AND WHEN HE FAILED TO REJECT A CONSIDERABLE QUANTITY OF INDISPUTABLY HEARSAY AVERMENTS IN HIS DETERMINATION AS TO WHETHER

THE AFFIDAVIT SET FORTH PROBABLE CAUSE." (Emphasis sic.)

Appellant directs this court's attention to the affidavits and testimony offered by Ms. Scott and Ms. McGauley. Appellant states that "*** where testimony and support of (here) a Motion to Suppress is offered and the testimony is not contradicted (either by positive testimony or by circumstance) and such evidence is not inherently improbable and the witness providing such evidence was not impeached, that testimony cannot be arbitrarily disregarded by the Court." Thus, appellant concludes, the trial court's decision as to whether probable cause existed was against the weight of the evidence.

As discussed in assignment of error one, the weight of the evidence and credibility of witnesses are primarily for the trier of fact, and the trier of fact is entitled to believe or not believe a witness' statements.

Crim.R. 12 (E) provides in pertinent part:

> "(E) Ruling on Motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.
>
> "***
>
> "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

In its April 7, 1995 findings of fact and conclusions of law, the trial court found:

> "After review of said warrant and the testimony of all the witnesses, it is clear that in the Affidavit in support of the Search Warrant neither officer included any false statement knowingly or intentionally, nor did either officer make any statement with reckless disregard for the truth.
>
> "***
>
> "The Defendant [appellant] failed to meet the

burden of proof by a preponderance of the evidence as required to prevail on his Motion to Suppress."

The trial court obviously chose to disbelieve the testimony of Ms. Scott and Ms. McGauley, which it was entitled to do. See Baker, supra, and Assignment of Error One. Consequently, as the burden of proof was on appellant, see Frank, supra, the trial court's decision to disbelieve appellant's witnesses and find that appellant had failed to meet his burden of proof is not against the manifest weight of the evidence. See also Assignment of Error One, supra.

Appellant's second assignment of error is found to be without merit.

In his third assignment of error, appellant contends:

"THE COURT ERRED WHEN IT FAILED TO ORDER THE RETURN OF ILLEGALLY SEIZED PROPERTY."

Appellant recognizes that the search warrant authorized that appellant be brought into custody. Appellant argues that he was arrested while driving a van, that the van was not designated as a place to be searched, that the police had neither probable cause or the authority to search the van, and that any property found in the van was illegally confiscated. Appellant argues that a "considerable quantity of money" was found during a search of the van.

Appellant's contention that a "considerable quantity of money" was taken from the van is not disputed by appellee. Appellee, in its brief, states:

"Appellant, also, refers to a large sum of money which was confiscated by officers during the search of his van. Federal agents inventoried and retained this money pursuant to a federal civil forfeiture action." (Appellee's brief, page 13)

Furthermore, a t the April 3, 1995 hearing on appellant's motion to suppress, during the cross-examination of appellant involving

the stop of the van, the prosecuting attorney asked the following:

"Q You were going to go to the Youngstown Airport; right?

"A Yes, I was.

"Q Were your tickets already purchased.

"A Yes, sir, right in my pocket.

"Q You were going to go to where, Toronto?

"A Yes.

"Q You were going up on vacation up there?

"A I was going to visit Shauna's father.

"Q And how long was that visit going to be for?

"A I don't know how long it to be. I didn't decide.

"Q And for that visit you were taking about $53,000 in cash with you; right?

"A No, I wasn't.

"Q You had $53,000 with you in the van?

"A Sure.

"Q Where did that money came from where?

"A It came from my - - it came from the 'Dare to Dream' organization. ***" (Emphasis added.)

The inventory list in the record, however, only reveals that $1,000 of United States currency was seized from the apartment on Otis Street and that $1,810 in United States currency was seized from appellant's person. Although it appears undisputed that authorities had confiscated $53,000 from the van appellant was driving, there is no inventory of this confiscation.

A further review of the record indicates that the trial court did not address this issue in its decision or in its findings of fact and conclusions of law. Therefore, this court cannot fully address appellant's third assignment of error.

The trial court's decision is hereby affirmed in part and remanded in part. This cause is hereby remanded to the trial court

to determine 1) the current location of the $53,000 taken from the van; 2) whether the $53,000 taken from the van was illegally seized; and 3) whether the $53,000 taken from the van should be returned to appellant.

Cox, J., concurs

Waite, J., concurs

APPROVED:

s/_____

Gene Donofrio

Presiding Judge

STATE OF OHIO	IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY	SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	CASE NO. 95 C.A. 140
	)	
LESTER SCOTT,	)	JOURNAL ENTRY
	)	
Defendant-Appellant.	)	

For the reasons stated in the opinion rendered herein, the first and second assignments of error are found to be without merit and overruled. Conviction affirmed. Based on the record before this court, we cannot address the third assignment of error. It is the final judgment and order of this Court that the judgment of the Common Pleas Court of Mahoning County, Ohio, is affirmed and this cause is remanded to determine: 1) the current location of the $53,000 taken from the van; 2) whether the $53,000 taken from the van was illegally seized; and 3) whether the $53,000 taken from the van should be returned to appellant. Costs to be taxed against appellant.

s/_____

s/_____

s/_____
JUDGES.

The Supreme Court of Ohio

1998 Term

State of Ohio,	:	
Appellee,	:	Case No. 98-791
v.	:	ENTRY
Lester Scott,	:	
Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by James R. Willis, Esq.

(Mahoning County Court of Appeals; No. 95CA140)

s/_____
THOMAS J. MOYER
Chief Justice

Filed July 1, 1998

Appendix "B"